Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4369

Appeal PA21-00320

Ministry of the Solicitor General

March 24, 2023

Summary: The appellant sought access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to information about police officer(s) with the Ontario Provincial Police (OPP) who accessed his information. The ministry refused to confirm or deny the existence of responsive records under section 14(3) of the *Act*. In this order, the adjudicator does not uphold the ministry's decision and orders it to issue another access decision in accordance with the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990. C. F.31, as amended, section 14(3).

Orders and Investigation Reports Considered: Order MO-4254.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry)[1] received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> …a copy of all persons who accessed my personal information in [Ontario Provincial Police (OPP)] Police databases from [specified time period]. I require name, date, time, computer used, search criteria, and any other relevant information.

[1] The OPP is a division of the ministry, who responds to access requests on behalf of the OPP.

[2] After receiving clarification from the requester, the ministry issued a decision stating that it refuses to confirm or deny the existence of responsive records in accordance with section 14(3) of the *Act*.

[3] The requester (now appellant) appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the appellant confirmed that he is only seeking access to information about who accessed his police records at the OPP, not to records relating to his direct involvement with the OPP. The ministry maintained its position to claim section 14(3) of the *Act*.

[5] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry under the *Act*.

[6] I decided to conduct an inquiry and I sought representations from the ministry, which were shared with the appellant in full.[2] I received representations from the appellant, which I shared with the ministry. I then sought and received additional representations from both parties.

[7] In this order, I do not uphold the ministry's decision to refuse to confirm or deny the existence of responsive records under section 14(3) of the *Act*. I allow the appeal and order the ministry to issue another access decision in accordance with the *Act*.

DISCUSSION:

[8] The sole issue to be determined in this order is whether the discretionary law enforcement exemption at section 14(3) applies to permit the ministry to refuse to confirm or deny the existence of records, if any exist.

[9] The appellant is seeking access to information about who accessed his police records at the OPP for a specified time period. The ministry denied his access request, relying on section 14(3), which reads:

> A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[10] The purpose of this section is to allow law enforcement agencies to withhold information in answering requests under the *Act* if it is necessary to do so in order for them to carry out their work and mandate. However, it is rare that disclosure of the mere existence of a record would prevent an ongoing investigation or intelligence-

[2] The ministry did not provide any confidential representations.

gathering activity from continuing.[3]

[11] For section 14(3) to apply, the institution must demonstrate that:

1. the record (if it exists) would qualify for exemption under sections 14(1) or (2) of the *Act*; and

2. disclosure of the fact that a record exists (or does not exist) would itself convey information that could reasonably be expected to compromise the effectiveness of an existing or reasonably contemplated law enforcement activity.[4]

[12] The ministry provided representations on the possible application of the exemptions at sections 14(1)(a), 14(1)(b), 14(1)(e), 14(1)(g) and 14(1)(l) of the *Act*, which state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (g) facilitate the commission of an unlawful act or hamper the control of crime;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

[13] Many of the exemptions listed in section 14 apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record. Generally, the law enforcement exemptions must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[5]

[14] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[6] The institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of

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[3] Orders P-255 and PO-1656.
[4] Order PO-1656.
[5] *Ontario* (*Attorney General*) *v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[6] Order PO-2040 and *Ontario* (*Attorney General*) *v. Fineberg*, cited above.

harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[7]

Representations

Ministry's representations

[15] The ministry explains that the OPP is a law enforcement agency and any records, if they existed, would typically be records created in the context of OPP law enforcement activities. It submits that it is impossible to predict what the appellant or another requester would do with responsive records, if they existed and they were disclosed, but its representations outline certain harms that it believes could reasonably occur.

[16] For part one of the test under section 14(3), the ministry's position is as follows:

> *Section 14(1)(a)/Law enforcement matter*: This exemption allows the [m]inistry to withhold records which, if they existed and were disclosed, would interfere with a 'law enforcement matter'. The 'law enforcement matter' in this case is the protection of policing data bases. The [m]inistry must be able to operate and maintain these records data bases to conduct its law enforcement activities. The [m]inistry must be able to document which officers accessed these data bases as part of its own quality assurance requirements. However, the [m]inistry must be able to do so knowing that the records it keeps about which officers accessed data bases will not be subsequently disclosed in the manner contemplated by this appeal. The [m]inistry submits that to disclose such records would harm the integrity of these data bases because of the amount of sensitive law enforcement information that would be disclosed, as we further elaborate upon below.
>
> *Section 14(1)(b)/Law enforcement investigation*: This exemption allows the [m]inistry to withhold records which, if they existed and were disclosed, could reasonably be expected to interfere with a law enforcement investigation. The [m]inistry submits that if records existed and were disclosed, they could reveal the following:
>
> > (i) The fact that the appellant could be under a police investigation. The appellant might deduce this by the fact that the police would not be accessing appellant's files unless an investigation was likely to be occurring;

[7] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4.

> (ii) If the appellant's files were accessed on multiple occasions, the appellant might deduce the size and scope of the investigation; and
>
> (iii) If officers from a specialized unit such as Intelligence were accessing the files, the appellant might deduce the fact that an investigation was related to intelligence matters.

The [m]inistry is concerned that the disclosure of records, if they existed, could tip off the appellant to the fact that an investigation was happening or had happened. This might lead the appellant to change their behaviour to thwart or evade an investigation. The [m]inistry submits that this information could be expected to harm investigations by providing the appellant with information they would not otherwise know about and that they should not know about to protect the integrity of the investigation. An investigation in these instances could be expected to be harmed if the kinds of information that are described were to be disclosed.

Section 14(1)(e)/Life or physical safety: This exemption allows the [m]inistry to withhold records which, if they existed and were disclosed, [it] submit[s] could endanger the life or safety of a law enforcement officer. The [m]inistry submits that [it] must consider the nature of the information being potentially withheld (records about criminal offences, etc) and the behaviour of individuals who may be captured in these records. The [m]inistry submits that it is reasonable to expect that individuals who are identified in criminal or police records may be more likely to be involved in criminal activities. Disclosing the names of police officers who accessed their files could reasonably be expected to subject them to intimidation or the [threat] of reprisals, in the hopes that this would thwart an investigation.

Section 14(1)(g)/*Law enforcement intelligence information*: This exemption allows the [m]inistry to withhold records, which if they existed and were disclosed could reasonably be expected to "interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons". Disclosing the names of police officers could reveal the existence of intelligence operations, if these officers were assigned to intelligence operations. Disclosing the existence of this kind of record could have serious repercussions for intelligence gathering. Past IPC orders have recognized the threat of disclosing records which could reveal covert surveillance [See Order PO-3521-1].

Section 14(1)(l)/*Commission of an unlawful act or control of crime*: This exemption allows the [m]inistry to withhold records which, if they existed and were disclosed, could reasonably be expected to facilitate the

> commission of an unlawful act or hamper the control of crime. The [m]inistry submits that the disclosure of the names of police officers who accessed police data bases could put officers[’] safety in danger, interfere with investigations or surveillance, and the integrity of police records data bases. [The ministry] submit[s] that it is reasonable to expect that any of these outcomes could either facilitate crime or hamper its control.

[17] The ministry submits that if responsive records existed and they were disclosed, they could be expected to potentially directly or indirectly reveal a significant amount of sensitive law enforcement information about law enforcement activity involving the appellant, which he would almost certainly not otherwise know about. It contends that the disclosure of any responsive records would harm law enforcement operations and individuals protected under section 14, including by revealing:

a. the identifies of any police officers who accessed records about the appellant in the course of discharging their duties, thereby potentially harming the officers’ personal safety;

b. whether the appellant’s police files were being accessed by police officers, which would tend to indicate whether the appellant was being investigated by police, either as part of a law enforcement investigation or through covert surveillance; and

c. the number of officers accessing the appellant’s files, thereby suggesting both the nature and scope of any investigation being conducted.

[18] It emphasizes that there is a direct link between the disclosure of records, if they exist and the ensuing harms that could be caused, and it is concerned that disclosure could result in the following additional harmful consequences:

a. Not only would the appellant be provided with sensitive law enforcement information, but the appellant could disseminate it freely to others at will, without any restrictions.

b. If it became widely known that this type of law enforcement information is being disclosed, it might encourage others to file similar types of requests.

c. Disclosing the names of police officers could be used by the appellant or another requester to acquire additional information that could be used to cause further harms to law enforcement operations, by revealing where certain officers work and the nature of a law enforcement investigation that might be taking place; and

d. Disclosing the requested information may impact the Royal Canadian Mounted Police (the RCMP), who operates the Canadian Police Information Centre (CPIC), or other law enforcement agency operations.

[19] To address part two of the test under section 14(3), whether disclosure of the fact that records exist (or do not exist) itself conveys information that could reasonably be expected to harm a section 14(1) or (2) interest, the ministry submits that:

> confirming the very fact that officers had accessed police data bases (or not) in respect of the appellant would reveal a significant amount of law enforcement information that would qualify for one or more of the exemptions listed above. We submit this existence or non-existence of the requested records would reveal to the appellant sensitive law enforcement information that they would not and should not otherwise know. This would be detrimental to law enforcement investigations or intelligence gathering, as well as potentially harming the safety of officers.

[20] It also submits that if there were no records responsive to the request, and this too was revealed, it could also be harmful to law enforcement operations. It could, for example, reveal weaknesses in law enforcement activities or operations, which could be exploited by the appellant or others to the harm and detriment of law enforcement.

Appellant's representations

[21] The appellant submits that the ministry's position is overly broad, vague and without merit, all of which undermines the purpose and effectiveness of freedom of information requests. He submits that the section 14(3) exemption does not allow the ministry to simply assert that there is a possibility of harm, if a record is disclosed; it must provide detailed evidence to show this risk is real. He characterizes the ministry's representations as "something might possibly be seen that could lead to a potential situation". He submits that none of the ministry's representations are rooted in fact, nor are they rooted in common sense, given his personal situation and standing in the community. While he acknowledges having a criminal record for driving offences, he indicates that he is not involved in a criminal lifestyle. He also explains that he received a response to the same access request sent to a municipal police service.

[22] The appellant submits that there is no plausible scenario whereby disclosing information about who accessed his police records and when could put any officers in danger. He also submits that obtaining access to the requested information would do nothing to impede any investigation or intelligence-gathering activities in which the OPP may be involved.

[23] In response to the ministry's representations that the "law enforcement matter" is "protecting policing databases" and that disclosure would "harm [its] integrity", the appellant submits that there is no evidence of this or even a description of what integrity means in this instance. He also submits that there is nothing to protect, except

for the fact that an officer(s) accessed his information outside the scope of their duties.[8]

Ministry's reply representations

[24] In response, the ministry responds that it would have made the same decision to anyone making a similar request regardless of whether they had a criminal record. It submits that the same principles apply no matter who the requester is, namely, that revealing who accessed an individual's personal information could undermine law enforcement activities.

Analysis and findings

[25] As explained below, I find that part two of the test is not satisfied.

[26] Under part two of the test, the ministry must demonstrate that disclosure of the mere fact that responsive records exist (or do not exist) would in itself convey information to the appellant and disclosure of that information could reasonably be expected to result in any of the harmed specified in sections 14(1)(a), 14(1)(b), 14(1)(e), 14(1)(g) and 14(1)(l) of the *Act*.

[27] The ministry submits that revealing whether or not an OPP officer(s) accessed police databases about the appellant would reveal law enforcement information that he would not and should not otherwise know and that this would be detrimental to law enforcement matters, investigations or intelligence gathering, as well as potentially harming the safety of officers.

[28] I find that the ministry has not provided sufficient evidence to establish that disclosing the mere fact that responsive records exist (or do not exist), which would indicate that searches had or had not been undertaken, could reasonably be expected to result in the specific harms in section 14(1) claimed by the ministry. I have reached this conclusion because the ministry has not provided detailed evidence about the risk of harm if the existence or non-existence of the requested information is confirmed or denied, nor has it shown that such risk of harm is real, and not just a possibility.

[29] The ministry's representations on part two are vague and ambiguous as to the possible harm that could occur by simply disclosing whether records exist or do not

[8] In his representations, the appellant alleges that an unidentified OPP officer accessed and disclosed his information. In response, the ministry states that the appropriate recourse is for the appellant to bring this concern to a local OPP detachment, the Office of the Independent Review Director (OIPRD) or the manager of the ministry's Freedom of Information office. It submits that this is a more appropriate and effective means of resolving this matter than providing the appellant with information which, if it exists, would not address whether it was collected, used and disclosed in an authorized and appropriate manner. As the issue in this appeal relates to access to information under the *Act*, any issues relating to the use and disclosure of the appellant's information are not part of the scope of this access appeal and I will not be referring to them again in this order. However, the appellant is free to make a privacy complaint to the IPC regarding the OPP's use and disclosure of his personal information. See Order MO-4254.

exist. For example, for sections 14(1)(a), 14(1)(b), 14(1)(g) or 14(1)(l) to apply, the ministry must demonstrate that *confirming or denying the mere existence* of responsive records could reasonably be expected to harm a specific and ongoing law enforcement matter or investigation,[9] to interfere with the gathering of or reveal law enforcement intelligence information or to facilitate the commission of an unlawful act or hamper the control of crime. While the ministry submits that it must be able to operate and maintain its records databases to conduct its law enforcement activities and protect the integrity of its databases, it has not provided sufficient evidence to demonstrate that confirming the existence of responsive records could be expected to harm the integrity of these databases.

[30] In addition, for section 14(1)(e) to apply, the ministry must demonstrate that *confirming or denying the mere existence* of responsive records could reasonably be expected to endanger someone's life or physical safety. Again, the ministry has not provided sufficient evidence to demonstrate that confirming the existence of responsive records could be expected to harm the life or physical safety of someone.

[31] As a result, I find that revealing that responsive records exist or do not exist would not in itself convey information that could reasonably be expected to result in any of the harmed specified in sections 14(1)(a), 14(1)(b), 14(1)(e), 14(1)(g) and 14(1)(l) of the *Act*. Therefore, part two of the test under section 14(3) has not been met. Having determined that the ministry fails to satisfy part two of the test, it is not necessary for me to consider part one of the test, namely, whether the records, if they exist, would be exempt under these same sections.

[32] Accordingly, I find that section 14(3) does not apply and the ministry cannot rely on that section to refuse to confirm or deny the existence of responsive records. Therefore, I will order the ministry to issue a new access decision on these records, without relying on the refuse to confirm or deny provisions of the *Act*.

ORDER:

1. I do not uphold the ministry's decision under section 14(3).

2. I order the ministry to issue another decision in response to the appellant's request, without relying on the refuse to confirm or deny provision of the *Act*, and treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act.*

Original Signed by: March 24, 2023
Valerie Silva
Adjudicator

[9] Order PO-2657.